87-2109

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1987

WOOD DAWSON SMITH & HELLMAN,
Cross-Appellant,

v.

FREDRIC HABERMAN, *et al.*,
Cross-Appellees,

and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. *et al.*,
Cross-Appellees.

On Cross-Appeal From the Supreme Court of Washington

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

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QUESTION PRESENTED ON CROSS-APPEAL

Does the portion of the Washington State Securities Act (codified as RCW 21.20.430(7) (1987)) that excludes bond counsel and underwriters from the benefits and protections granted to all other persons associated with the issuance or sale of municipal bonds of Washington issuers violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and, if so, is the proper remedy to sever the offending portion of the statute?

LIST OF PARTIES

The list of parties may be found at p. 136a of the Jurisdictional Statement of Cross-Appellee American Express Travel Related Services Company, et al. for No. 87-1889, which is adopted here by reference. The list of parties is also at p. la of the Jurisdictional Statement

of Cross-Appellee Fredric Haberman, et al. in No. 87-1897, which is adopted here by reference.

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INTRODUCTION

Wood Dawson Smith & Hellman ("Wood Dawson") cross-appeals from a portion of a final judgment and opinion of the Supreme Court of Washington dated October 8, 1987. That judgment upheld the validity of a portion of the Washington State Securities Act ("WSSA") added

by amendments in 1985 and 1986 and codified at Wash. Rev. Code § 21.20.430(7) (1981) (amended, 1985, 1986). The Supreme Court of Washington held that the portion of Wash. Rev. Code § 21.20.430(7) (1987) that excludes bond counsel and underwriters from the higher degree of protection afforded to all other persons associated with the issuance and sale of municipal bonds of Washington issuers for alleged securities fraud violations does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Cross-appellees Fredric Haberman, et al. ("plaintiffs"), and American Express Companies and United States Trust Company of New York, as Trustee (collectively "Amexco/US"), filed their separate jurisdictional statements on May 19, 1988

(No. 87-1897), and May 18, 1988 (No. 87-1889), respectively, both on appeal from the aforementioned judgment and opinion of the Supreme Court of Washington. That opinion was modified by an order dated February 17, 1988, and reconsideration was denied on February 19, 1988. Wood Dawson received the jurisdictional statements of both plaintiffs and Amexco/US on May 23, 1988. Wood Dawson hereby submits its Jurisdictional Statement on Cross-Appeal pursuant to Supreme Court Rule 12.4.

Wood Dawson's position is that a severable portion of Wash. Rev. Code § 21.20.430(7) (1987) violates the Equal Protection Clause of the Fourteenth Amendment because it excludes Wood Dawson as bond counsel (and also excludes underwriters) from the statute's protection of all other persons associated with the

issuance and sale of municipal bonds of Washington issuers, including the issuer, its employees, and other similarly situated agents of the issuer; the statute does not extend to bond counsel or underwriters the scienter standard for liability that it grants to all others. It unconstitutionally singles them out and subjects them to liability for negligence, even in the absence of scienter.

Wood Dawson does not support plaintiffs' position that the retroactive application of the 1985 and 1986 amendments to the WSSA violates the Contract Clause. Nor does Wood Dawson support Amexco/US's position that the 1985 and 1986 amendments violate the Commerce Clause or that the 1986 amendment violates due process rights under the Fourteenth Amendment of the Constitution. Wood Dawson also does not support

Amexco/US's position that the remedy for the 1985 and 1986 amendments' violation of the Fourteenth Amendment's equal protection guarantees is to strike the amendments in their entirety.

OPINIONS BELOW

This case was commenced in the King County Superior Court in the State of Washington and was designated No. 84-2-06452-8. The trial court's Order and Judgment of Dismissal prior to discovery dated October 7, 1985, is unreported. It is reprinted at p. 227a of plaintiffs' Appendix to Jurisdictional Statement ("Plaintiffs' Appendix") and at p. 139a of Amexco/US's Jurisdictional Statement.

The decision of the Supreme Court of the State of Washington was issued on October 8, 1987, and is reported at 109 Wn.2d 107 and 744 P.2d 1032. It is

reprinted at p. 1a of both Plaintiffs' Appendix and of Amexco/US's Jurisdictional Statement.

BASIS FOR JURISDICTION

Plaintiffs filed their Notice of Appeal with the Washington Supreme Court on March 25, 1988, and their Amended Notice of Appeal on May 11, 1988. Wood Dawson received plainfiffs' Jurisdictional Statement for No. 87-1897 on May 23, 1988. Amexco/US filed its Notice of Appeal in both the Washington Supreme Court and the King County Superior Court on May 10, 1988. Wood Dawson also received its Jurisdictional Statement for No. 87-1889 on May 23, 1988. This cross-appeal is docketed under Supreme Court Rule 12.4.

Both plaintiffs and Amexco/US assert that jurisdiction to entertain their appeals lies under 28 U.S.C. § 1257(2).

If such jurisdiction exists, then jurisdiction also lies under that statute with respect to Wood Dawson's cross-appeal. See Regan v. Taxation With Representation, 461 U.S. 540, 543, n. 3.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 21.20.430(7) (1981) (amended 1985, 1986):

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.10.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.10.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control

> of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

REASONS FOR CONSIDERATION OF THE CROSS-APPEAL

Wood Dawson has filed this cross-appeal because it seeks different relief from a portion of the decision of the Court below than do cross-appellees and to present fully its position for con-

sideration to this Court. Both plaintiffs and Amexco/US have presented extensive recitations of fact and appendices. Wood Dawson does not necessarily agree with characterizations of fact made by either or both cross-appellees, but will assume familiarity with the facts as stated for the purposes of this Jurisdictional Statement on Cross-Appeal. Wood Dawson will add only those facts deemed relevant to its position. Wood Dawson adopts the appendices of both cross-appellees for the purposes of this Jurisdictional Statement on Cross-Appeal.

STATEMENT OF THE CASE

This state law securities fraud litigation arises out of the default by the Washington Public Power Supply System ("Supply System") on bonds issued to fund the construction costs of Nuclear Projects 4 and 5. This case was filed

after the failure of the bondholder trustee's state court attempt to enforce contracts with 88 utilities that were participants in the program to build the nuclear projects.

Wood Dawson And Other Consultants

Wood Dawson acted as bond counsel to the Supply System for the 14 related bond issues for Projects 4 and 5. Wood Dawson was only one of a number of consultants employed by the Supply System to provide professional services with respect to the issuance of these bonds. The other professional consultants included Ernst & Whinney, the auditor; Blyth Eastman Paine Webber, Inc. ("Blyth"), the financial advisor; United Engineers and Constructors, Inc. ("UE&C"), and Ebasco Services, Inc. ("Ebasco"), the architect engineers; R.W. Beck & Associates ("Beck"), the consulting engineer; and

Houghton Cluck Coughlin & Riley ("Houghton Cluck"), special counsel.

Although the services of each of these consultants varied, depending on the nature of their expertise, they are otherwise situated in a position identical to Wood Dawson according to the allegations in Plaintiffs' Third Amended Complaint and Restated Demand for Jury Trial ("TAC") at ¶¶ 32-35, and 110-116 (Ernst & Whinney); ¶¶ 37-44 and 118-126 (Blyth); ¶¶ 45-51 and 128-134 (UE&C, Ebasco, and Beck); ¶¶ 54-59 and 137-144 (Houghton Cluck and Wood Dawson). The consultants allegedly each participated in and attended meetings of the Supply System's board of directors, the Supply System's executive committee, and the participants' committee; each allegedly provided written opinions attached to the Official Statements for the bonds on

matters within each consultant's area of expertise. All of the consultants each allegedly participated in meetings in New York City and other cities with municipal bond rating agencies, underwriters and large institutional investors to induce the initial purchase of the bonds and to assure an after-market for the securities; and each of the consultants was allegedly a substantial participant in the offer and sale of the bonds. In addition, Ernst & Whinney allegedly issued opinions on the Supply System's financial statements similar to Wood Dawson's issuance of legal opinions. Plaintiffs also allege as to compensation: that none of these consultants would have been paid but for the sale of the bonds; that the Supply System was the largest Washington State customer of each consultant; and that the Supply System

paid annual fees of more than $5,000,000 for Ernst & Whinney and for the attorneys and a total of more than $10,000,000 to Blyth and the engineers. TAC at ¶¶ 111, 112, 118, 119, 128, 129, 136 and 137.

The facts alleged in the TAC are the facts before the Court when reviewing a motion to dismiss. See Miree v. DeKalb County, 433 U.S. 25, 27 and n. 2 (1977). According to the allegations, Wood Dawson and the other professional consultants were similarly situated in relation to their services to and compensation received from the issuer, the Supply System.

The Amendments To The WSSA

The Washington Legislature amended the WSSA in 1985 by adopting Senate Bill 4114, codified at Wash. Rev. Code § 21.20.430(7) (1981) (amended 1985, 1986) (the "Scienter Amendment"). The

Scienter Amendment extended the requirement of scienter for liability under the WSSA from the State and its agencies to all of Washington's political subdivisions, municipal and "quasi-municipal" entities, and their public officers, directors, employees and agents, consistent with federal securities law. This Amendment was in part a reaction to a Washington Supreme Court decision that overruled an earlier decision and held that the standard of liability under the WSSA was negligence rather than scienter. See Kittilson v. Ford, 93 Wn.2d 223, 608 P.2d 264 (1980); remarks of Senator Bottiger in support of Senate Bill 3990 in 1986 expressly making the Scienter Amendment retroactive: "[scienter has] been the standard in this state for a long, long time. In 1980, a

court -- in a bad set of facts -- came along and changed it. We immediately changed it back," Plaintiffs' Appendix at 112a. However, in a portion of the Amendment totally inconsistent with federal securities law and past state securities law, the Scienter Amendment expressly excluded bond counsel and underwriters alone from the protection of the Amendment's return to the scienter standard for all other parties associated with the issuance and sale of bonds of a Washington municipal or "quasi-municipal" entity. Bond counsel and underwriters alone remain subject to the negligence standard first imposed by Kittilson on all persons associated with a Washington municipal bond issue.

The federal court in the related multidistrict litigation ruled that the

Scienter Amendment was not retroactive, In re Washington Public Power Supply System, MDL 551 (W.D. Wash.) ("WPPSS Federal Action"), order filed January 24, 1986. The Washington State Legislature then enacted Senate Bill 3990 ("Retroactivity Amendment"), which added an express retroactivity clause at the end of the section, which became effective April 4, 1986.

Legislative History

The legislative history of the Scienter Amendment and the Retroactivity Amendment reveals a discriminatory intent behind the exclusion of bond counsel (and underwriters) from the Amendments' benefits and protections, including the return to the scienter standard for persons associated with Washington municipal bond issues and sales. Senate Majority

Leader Bottiger, a prime sponsor of the Retroactivity Amendment, stated that the purpose of the exclusionary portion of the Scienter Amendment was to ensure that "bond counsels . . . pay the bondholders" rather than "the rate payers -- the people of the State of Washington." He told the Senate:

> Mr. President and members of the Senate. The only thing that wasn't said on the original debate is that the rate payers are really the people that are affected by this bill. I wouldn't want anybody to think that the county commissioners or the city council of the city of Tacoma or Seattle or whatever are the ones that we are talking about. What we are talking about are the rate payers of the PUD's and the municipals and the co-ops all over this state. . . . The action brought, and pending in court, by the bondholders alleging that they were misled by the bond statements and the prospectuses that were issued by the underwriters should not be passed through. If they are successful, it should not be passed through to the rate payers on the theory of agency. So the

> vote here is, in my opinion, shall the underwriting firm that handled that bond issue and their bond counsels pay the bond-holders, or shall the rate payers -- the people of the state of Washington. This bill says not the rate payers.

Senate Floor Proceedings, Plaintiffs' Appendix at pp. 114a-115a (emphasis added).

When asked whether the proposed amendment would protect public utility district ("PUD") boards from fraud claims, Senator Bottiger described how he understood the roles of the parties involved and the effect of the Scienter Amendment's exclusion of bond counsel and underwriters:

> Senator Bottiger: Senator, what happens is the PUD's vote to authorize some bonds, then the underwriters and bond counsels prepare a prospectus. They are

> traditionally thought of as agents of the board and of the PUD. They are responsible, in my opinion, I think it clearly says "to a negligent standard." If they do that in a negligent way, people rely on it and buy the bonds, they're liable, but is the board that simply hired them liable? The answer is, as you and I know, we are held unless we are in an evil mind decide to do this, we are not personally liable.

Senate Floor Proceedings, Plaintiffs' Appendix at 112a (emphasis added).

The King County Superior Court dismissed all claims against Wood Dawson and other defendants on motions to dismiss. As part of its decision it ruled that the Scienter Amendment's provision excluding bond counsel and underwriters was valid, despite Wood Dawson's challenge. Plaintiffs' Appendix at 227a-229a; Amexco/US Jurisdictional Statement at 102a-104a. The Supreme Court of Washington subsequently upheld

the exclusion of bond counsel from the protections of the Scienter and Retroactivity Amendments against Wood Dawson's equal protection claims.

THE QUESTION PRESENTED IS SUBSTANTIAL

Only A Severable Portion Of The Scienter And Retroactivity Amendments Violates The Equal Protection Clause Of The Constitution

Amexco/US argues Scienter Retroactivity Amendments violate the Equal Protection Clause. Amexco/US Jurisdictional Statement, pp. 18-24. Amexco/US states the general rule that economic legislation such as this, which does not affect fundamental rights or suspect classification, may be upheld if it bears a rational relationship to a legitimate state interest, citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985), and other cases.

Amexco/US also sets forth the rules governing Equal Protection analysis that (1) the state's purpose in creating the classification must be legitimate and (2) the classification must be rationally related to that legitimate purpose in order for the classification to be upheld. Amexco/US Jurisdictional Statement, pp. 19-20. See Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 881 (1985).

Wood Dawson generally agrees with Amexco's discussion at pp. 20-21 that "the amendments unconstitutionally distinguish between bond counsel and the other parties." Wood Dawson agrees that the State of Washington did not have a legitimate purpose behind creating the classification, and that therefore the usual deference accorded statutes is not

appropriate here. Wood Dawson agrees with Amexco/US's discussion of and application to this situation of United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Moreno held that a legislature's desire to harm a politically unpopular group, in that case "hippies," cannot constitute a legitimate governmental interest. Id. at 534-35. Moreno provides a proper basis for ruling here that the exclusionary provision of Wash. Rev. Code § 21.20.430(7) (1987) violates equal protection guarantees because it is based on a desire to harm the politically unpopular group of bond counsel. Such a ruling would be particularly appropriate in this case because of the remote likelihood that the exclusion of bond counsel would eventually be rectified by demo-

cratic processes. See Cleburne, 473 U.S. at 440.

Wood Dawson also generally agrees with Amexco/US's discussion to the effect that the four bases for the "rational relationship for the distinction drawn between bond counsel and other professionals employed by the issuer" put forth by the Washington Supreme Court are not valid. Amexco/US Jurisdictional Statement, pp. 21-23. Wood Dawson also agrees with Amexco/US's discussion that there is no rational relationship between the classification drawn in the legislation and the underlying purposes of the legislation.

In addition, the Court below appears to have disregarded the facts as pleaded by plaintiffs in its four-fold rationale for upholding the classification. As an example, the Court below found the

"Legislature could have determined that bond counsel are, thus, more profit oriented . . . than other agents of a public issuer." Plaintiffs' Appendix at 35a The Court below apparently disregarded the allegations in the TAC, discussed above, regarding the compensation for the Supply System's other consultants, including the allegation that none would be paid unless the bonds were issued. Moreover, there is no indication the legislature considered supposed differences in the compensation of consultants to municipal issuers. Nor does the compensation of consultants as alleged in the TAC provide a basis supporting the classification since there is no justification in the TAC for singling out bond counsel from any other agents.

The Washington Supreme Court's use of bond counsel compensation to justify the classification thus was not and could not reasonably have been a "legislative fact" on which the classification was based. Bond counsel's compensation, therefore, cannot be a proper justification for the classification. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

The Proper Remedy Is Extension Of Benefits To The Excluded Parties

Wood Dawson disagrees with Amexco/US's contention that the intent of the Scienter and Retroactivity Amendments is to provide special treatment to the State of Washington and its instrumentalities from which bond counsel and underwriters are excluded. Amexco/US Jurisdictional Statement, 23. The underlying intent and

effect of the legislation is to make the state securities laws, as related to municipal bond issues, consistent with federal securities laws, and to return to the pre-Kittilson standard of scienter. It also contains the impermissible exclusion of bond counsel from this benefit for securities claims defendants. There is no mischief in changing the standard of liability nor in making it retroactive. The unconstitutional evil lies in irrationally excluding certain of those professionals considered by the legislature to be agents of the municipal issuer from the protections of the new standard.

The remedy for such an unconstitutional underinclusion is normally to extend the scope of the statute and its benefits to cover the excluded group. Heckler v. Matthews, 465 U.S. 728, 738-39

and n. 5 (1984); Califano v. Westcott, 443 U.S. 76, 89 (1979). See Welsh v. United States, 398 U.S. 333, 361-62 (1970) (Harlan, J., concurring). Severance is especially favored in light of the general severability provision for the WSSA, Wash. Rev. Code 21.20.905 (1959), and the severability provision contained in the Retroactivity Amendment. Senate Bill No. 3990, § 2. If there is any question as to the underlying intent and whether the offensive portion of the Amendments may properly be severed, Wood Dawson submits that this question should be remanded to the Washington Supreme Court for determination under applicable state law.

CONCLUSION

If this Court notes probable jurisdiction in either No. 87-1897 or No. 87-1889, or both, it should also consider Wood Dawson's cross-appeal.

Respectfully submitted,

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June 22, 1988

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AFFIDAVIT OF SERVICE

GREGORY MANN MILLER, under oath states:

1. I am one of the counsel for Cross-Appellant Wood Dawson Smith & Hellman and am competent to testify to the following facts on personal knowledge.

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